

HISTORICAL DIVISION[223]

Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)“b.”

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code section 303.1A, the Director of the Department of Cultural Affairs hereby gives Notice of Intended Action to amend Chapter 42, “Review and Compliance Program,” Iowa Administrative Code.

The State Historic Preservation Office annually receives a federal grant through the Historic Preservation Fund administered by the National Park Service. Acceptance of the federal grant stipulates compliance with the requirements of the Historic Preservation Fund Grants Manual. The rules in Chapter 42 explain the procedures the State Historic Preservation Office follows in order to implement the Review and Compliance Program requirements in the Historic Preservation Fund Grants Manual, the National Historic Preservation Act, and Iowa Code chapter 303. These proposed amendments set forth how the Department will implement changes in state law while continuing to ensure compliance with applicable federal law and regulation. The amendments also set forth the process by which the Director will review recommendations.

Written public comments concerning these proposed amendments will be accepted until 4:30 p.m. on May 8, 2012. Interested persons may submit written or oral comments by contacting Kristen Vander Molen, Department of Cultural Affairs, Historical Building, 600 East Locust Street, Des Moines, Iowa 50319-0290; fax (515)282-0502; E-mail Kristen.VanderMolen@iowa.gov. Persons who wish to convey their views orally should contact the Department of Cultural Affairs at (515)281-4228.

Also, there will be a public hearing on May 10, 2012, at 10 a.m. at the above address in the Auditorium, First Floor, at which time persons may present their views either orally or in writing. At the hearing, persons will be asked to give their names and addresses for the record and to confine their remarks to the subject of the amendments.

Any persons who intend to attend the public hearing and have special requirements, such as those relating to hearing or mobility impairments, should contact the Department and advise of specific needs.

After analysis and review of this rule making, a positive impact on jobs exists. This rule making streamlines the process to allow construction projects to proceed. Construction projects can commence after review by the state’s State Historic Preservation Officer’s (SHPO) Office. This rule making implements recent legislation by streamlining the application process conducted by SHPO and improving the permit process for construction projects.

The direct impacts of construction per 100 miles which would take approximately 52 weeks would be approximately 18 to 20 jobs for construction personnel, three digger derrick trucks, three backset trucks, and four pick-up trucks. FEMA and the state of Iowa have approved 2,400 miles of line construction directly tied to the FEMA 404 Mitigation Program. Currently pending, there are another 1,300 miles of construction projects being evaluated and considered for approval by FEMA.

The total cost of these projects is \$225 million. If each project allows for approximately 18 to 20 jobs per hundred miles and each project takes approximately 52 weeks, this rule making will help create approximately 740 jobs for a 52-week period. Obligations for funding these projects have begun, as FEMA requested Archaeological Phase 1 surveys be completed. The schedule of this work is concurrent with the FEMA 406 storm rebuild projects.

The crew stays in local Iowa hotels and eats three meals a day at local Iowa restaurants. The majority of these projects take place in rural Iowa and would greatly benefit small towns in Iowa. Also, each truck (approximately ten) would use approximately 60 to 80 gallons of fuel per week. All fuel purchases would

be local in Iowa. The total fuel purchases for ten trucks for 52-week projects would be approximately 36,400 gallons of fuel purchases in Iowa per project. Contractors rent space to park the ten vehicles used per project, storage for materials, and office space for contractors. Contractors utilize local Iowa mechanic shops for repairs on trucks. Further, the bulk of the construction materials are provided by distributors located in the state of Iowa. Multiple jobs will be created due to the sheer volume of materials required for each construction project. The transportation industry in Iowa will benefit because of the materials being shipped to Iowa. The State will receive a positive fiscal impact due to the significant amount of sales tax on materials bought here in Iowa.

The Department of Cultural Affairs and the State of Iowa's SHPO Office will continue to collaborate with stakeholders to maximize this rule making's positive impact on jobs.

These amendments are intended to implement 2011 Iowa Code Supplement section 303.2, subsection 2, paragraph "c," and section 303.18 and 16 U.S.C. 470 et seq.

The following amendments are proposed.

ITEM 1. Amend rule 223—42.1(303) as follows:

223—42.1(303) Purpose. ~~The review and compliance program implements Section 106 of the National Historic Preservation Act of 1966 for the purpose of taking into account the effects of an agency's undertaking on properties included in or eligible for the National Register of Historic Places.~~ state historic preservation program activities to advise and assist public (federal, state, and local government) agencies in carrying out their historic preservation responsibilities broadly described and established under the National Historic Preservation Act, particularly Sections 106 and 110, as well as other state and federal historic preservation laws and regulations.

ITEM 2. Amend rule 223—42.2(303) as follows:

223—42.2(303) Regulations Federal regulations and requirements. ~~The Iowa review and compliance program shall operate in accordance with the National Historic Preservation Act of 1966, Section 106; and 36 CFR Part 800, September 21, 1986.~~ following requirements:

42.2(1) The National Historic Preservation Act (16 U.S.C 470 et seq.).

42.2(2) Title 36 of the Code of Federal Regulations Part 60 (36 CFR 60).

42.2(3) Title 36 of the Code of Federal Regulations Part 61 (36 CFR 61).

42.2(4) Title 36 of the Code of Federal Regulations Part 63 (36 CFR 63).

42.2(5) Title 36 of the Code of Federal Regulations Part 800 (36 CFR 800).

42.2(6) Contract requirements outlined in the state of Iowa's Historic Preservation Fund grant agreement with the National Park Service, including requirements described in the Historic Preservation Fund Grants Manual, special conditions attached to the grant agreement, and any other National Park Service requirement considered a condition of receiving the annual federal grant.

42.2(7) Nationwide Programmatic Agreements and other federal program alternatives executed or issued by the Advisory Council on Historic Preservation under 36 CFR 800.14, as applicable.

42.2(8) State-level programmatic agreements and memoranda of agreements executed under 36 CFR 800.6 and 800.14.

42.2(9) Easements and covenants granted pursuant to the implementation of state historic program activities.

42.2(10) Iowa Code chapter 303.

ITEM 3. Renumber rule ~~223—42.3(303)~~ as ~~223—42.5(303)~~.

ITEM 4. Adopt the following **new** rules ~~223—42.3(303)~~ and ~~223—42.4(303)~~:

223—42.3(303) Professional qualifications. In keeping with federal Historic Preservation Fund grant requirements, the department shall employ a professionally qualified staff that meets the requirements set forth in 36 CFR 61.4(e).

223—42.4(303) Definitions. Unless the context requires otherwise, the definitions provided in the National Historic Preservation Act and its implementing regulations at 36 CFR 60, 36 CFR 61, and 36 CFR 800 shall apply to terms as they are used through this chapter. In addition, the following definitions apply:

“Act” means the National Historic Preservation Act (16 U.S.C. 470 et seq.).

“Adequate documentation” means documentation consistent with 36 CFR 800.11 and shall include a statement of significance or nonsignificance with sufficient historic context to make an evaluation of National Register eligibility pursuant to 36 CFR 60 and an assessment of proposed treatment methods pursuant to 36 CFR 61.

“Agency” means federal agency.

“Agreements” means any programmatic agreements, memoranda of agreement, state-level agreements, or other agreements executed between the state historic preservation officer, federal or state agencies including those authorized by Iowa Code section 28E.4, and other consulting parties as part of consultation under Section 106 of the Act.

“Area of potential effects” or “APE” means the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist. The area of potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking (36 CFR 800.16(d)).

“Historic property” means “historic property” as defined in 36 CFR 800.16(l).

“Undertaking” means, as defined in Section 301 of the National Historic Preservation Act, a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a federal agency, including (1) those carried out by or on behalf of the federal agency; (2) those carried out with federal financial assistance; (3) those requiring a federal permit, license or approval; and (4) those subject to state or local regulation administered pursuant to a delegation or approval by a federal agency.

ITEM 5. Amend renumbered rule 223—42.5(303) as follows:

223—42.5(303) Procedures.

42.5(1) *Technical assistance.* ~~The state historic preservation officer, or designee, shall consult with agency officials expending federal funds to identify historic properties, assess effects of the undertaking on historic properties, and consider alternatives to avoid or reduce the effects. The state historic preservation office (SHPO) shall advise and assist federal agencies in carrying out their responsibilities under the Act (and other federal historic preservation laws) and shall cooperate with federal agencies, state agencies, local governments, or their applicants; organizations; and individuals to ensure historic properties are taken into consideration at all levels of planning and development.~~

42.5(2) *SHPO review of federal undertakings.*

a. In accordance with applicable federal and state laws and regulations, agency officials and agency program applicants or recipients requesting formal SHPO comment on an undertaking shall submit documentation regarding the undertaking and potential effects to historic properties.

b. Agency officials desiring a Section 106 review shall contact the review and compliance coordinator to obtain the appropriate forms required to evaluate the effects. Completion of the forms does not constitute clearance of the proposed projects, but is intended to assist the review and compliance staff in rendering an informed recommendation. The SHPO shall make available forms intended to assist agency officials and agency program applicants and recipients in organizing information and to allow the review and compliance program staff and other consulting parties to render informed advice on an undertaking. Forms will be made available on the state historical society of Iowa Web site. Inquiries may Submittals shall be directed to Review and Compliance Coordinator, State Historical Society of Iowa, Capitol Complex, Des Moines, Iowa 50319, (515)281-4137.

c. SHPO reviews shall be conducted by professional staff that meet federal qualification standards for preservation disciplines appropriate to the types of resources the undertaking may affect.

d. The SHPO shall respond to initial determinations submitted by agency clients pursuant to formal agency delegations or to a final agency determination of eligibility.

e. The SHPO shall apply the National Register Criteria for Evaluation when making determinations of National Register eligibility.

f. A SHPO nonconcurrency with an agency determination of eligibility shall include an explanation based in the National Register Criteria and relevant National Park Service guidelines for evaluation of historic properties.

g. The SHPO shall respond to agency determinations or findings of effect.

h. A SHPO nonconcurrency with an agency finding or determination of effect shall include an explanation based in the Council's criteria of adverse effect (36 CFR 800.5).

i. If the SHPO elects to consult, the SHPO shall respond within 30 calendar days of receipt of an agency's request for review of a finding or determination in accordance with 36 CFR 800.3(c)(4) and the National Park Service's applicable requirements.

j. The recommendations and decisions of the state historic preservation officer are subject to the review and approval of the director. This review may be initiated by the director for any reason or may be requested in the manner described in rule 223—42.7(303). To facilitate this opportunity for review, the SHPO will generally submit its recommendation to the director within 14 calendar days of receipt.

k. If the director is unable to make a determination regarding the request for review within the federally mandated 30-day consultation period, the director may, if the applicant agrees, request that the federal agency extend the consultation period for such time as the director requires to make such a determination, but in no event shall the requested extension exceed 14 days.

42.5(3) Resolution of adverse effects. The SHPO shall consult with agencies and other consulting parties to develop and evaluate alternatives or modifications to undertakings that could avoid, minimize, or mitigate adverse effects on historic properties in accordance with the provisions of 36 CFR 800.6 or the terms of executed agreements, easements and covenants.

~~42.5(3) Responses to agency requests shall be made by the review and compliance staff within 30 days. Responses may indicate that no historic properties are located within the impact area, request the presentation of additional information and research, or that there is an effect. If an impact is indicated the review and compliance staff shall indicate the steps desired to mitigate the impact.~~

~~42.5(4) After initiating consultation, the state historic preservation officer or designee, the funding agency official, or the Advisory Council for Historic Preservation, at its discretion, may state that further consultation may not be productive and thereby terminate the consultation process. The agency official may then request the Council's comments in accordance with Section 800.6(b) of the National Historic Preservation Act of 1966 and notify all other consulting parties of the request.~~

ITEM 6. Adopt the following new rules 223—42.6(303) and 223—42.7(303):

223—42.6(303) Level of effort required to identify historic properties.

42.6(1) The level of effort required to meet the “reasonable and good faith” standard in Section 106 review is set forth in 36 CFR 800.4. The level of effort required shall be based on past planning, research and studies, the magnitude and nature of the undertaking and the degree of federal involvement, the nature and extent of potential effects on historic properties, and the likely nature and location of historic properties within the APE and may consist of any combination of background research, consultations, oral history interviews, sample field investigations and field surveys.

42.6(2) In response to the agency's request for consultation, the SHPO shall base any recommendation for the identification of historic properties upon a review of existing information on historic properties within the APE or historical factors that would indicate such properties are likely to exist within the APE.

42.6(3) It is the statutory obligation of the agency to fulfill the requirements of Section 106.

42.6(4) The level of effort required of rural electric cooperatives and municipalities shall be consistent with the requirements set forth in 2011 Iowa Code Supplement section 303.18.

223—42.7(303) Review and appeal of the recommendations and decisions of the state historic preservation officer.

42.7(1) The recommendations and decisions of the state historic preservation officer are subject to the review and approval of the director. This review may be initiated by the director for any reason or may be requested in the manner described in this rule.

42.7(2) A person requesting the review of a recommendation or decision of the state historic preservation officer directly affecting that person shall provide the director with the following information, orally or in writing:

- a.* Name and address of the requester.
- b.* A description of the action of the SHPO requested to be reviewed.
- c.* A short and plain statement of the reasons the review is requested.

42.7(3) Within 15 days following receipt of a request for review, the director shall notify the requester of the disposition of the request or of the need for additional information. Within 30 days following the receipt of the requested additional information the director will notify the requester in writing of the disposition of the request for review.

42.7(4) A decision of the director is a final agency action. Judicial review of the actions of the director may be sought in accordance with the terms of the Iowa administrative procedure Act, Iowa Code chapter 17A.